Supreme Court, U.S.
FILED
OCT 24 1997
CLERK

No. 97-528

In The

Supreme Court of the United States

October Term, 1997

BARBARA GUNERATNE,

Petitioner,

v.

ST. MARY'S HOSPITAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent believes that Petitioner has misstated the question presented for review and, thus, Respondent rephrases the question presented as follows:

> Whether Respondent's return-to-work policy was a *per se* violation of the Americans with Disabilities Act?

PARTIES TO THE PROCEEDINGS

1. Barbara Guneratne, Plaintiff and Appellant below and Petitioner for certiorari before this Honorable Court;

2. St. Mary's Hospital, Defendant and Appellee below and Respondent before this Honorable Court.

The following is the parent company of respondent St. Mary's: Sisters of Charity of the Incarnate Word. There are no non-wholly-owned subsidiaries of respondent St. Mary's Hospital.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, St. Mary's Hospital, respectfully requests that this Court deny the petition for writ of certiorari to review the unpublished decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 18, 1997. That opinion upheld the district court's entry of summary judgment on behalf of St. Mary's Hospital in *Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771 (S.D. Tex. 1996), *aff'd*, 119 F.3d 3 (5th Cir. 1997) (Table).

STATEMENT OF FACTS

Petitioner, a registered nurse, began working for St. Mary's Hospital in 1989. She held several different jobs with the hospital until July 21, 1993, when she requested a transfer to the position of clinical relief nurse. On August 15, 1993, after approximately three (3) days on the job as a clinical relief nurse, petitioner claimed that she had injured her back while attempting to lift a patient.

Petitioner sought medical care in connection with her alleged injury, but did not attempt to return to work until on or about June 8, 1994, almost one (1) year later, when she submitted a release to St. Mary's with restrictions from her physician, Dr. J. Pat Kearney. Pursuant to Dr. Kearney's release, her activity was to be limited to "no lifting or bending greater than 5 [pounds]." On July 27, 1994, petitioner submitted a second release with restrictions from Dr. Kearney which stated, "avoid heavy lifting." Petitioner was advised by St. Mary's that its return-to-work policy required that she present "a physician's

release to full duties with no restrictions" before she could return to work. St. Mary's policy states:

> Employees having been off work five days or more due to illness, injury, or medical reasons are required to present a physician's release to return to work without restrictions, to the employee health nurse or designee prior to returning to work.

Petitioner's complaint alleged that this policy is an illegal "100% recovery" policy. Two hospital employees provided testimony before the district court in support of respondent's motion for summary judgment, clearly stating that St. Mary's policy is not a "100% recovery" policy.

Petitioner quoted from the testimony of Maria Theresa Mendez, Manager of Human Resources, without giving this Court the proper context. Mendez's testimony, taken in its proper context, explained the following:

> Q: Then Barbara Guneratne could have come back to work at any point in time if she had just simply told y'all that she was ready to come back to work?
>
> A: If she had a full release of her – of her job duties that she could perform, yes, sir, she could have returned to work.
>
> Q: And we talked about that a little bit this morning. You were not here. But what is your understanding of this full release? What – what is the employee required to produce?
>
> A: Their full release of their – pertaining to their job. They have the ADA behind their job description that would tell them how

> much they could lift and the things they could actually do. So, it's pertaining to your job.

This testimony was further supported by Mendez's superior, James Fitch, the Director of Human Resources, who explained:

> Q: Okay. Under 2, it says, "Employees having been off from work five days or more due to illness, injury or medical reasons are required to present a physician's release to return to work without restrictions to the employee health nurse or designee prior to returning to work." It has the language "to work without restrictions." What does that mean?
>
> A: I answered that before; but my interpretation of that is in terms of restrictions relating to the essential elements and physical responsibilities, requirements of the job. That's – that's what that means.

In summary, St. Mary's assessed the employee's ability to perform the essential functions of her position based on a comparison between the restrictions noted on the release and the ADA requirements for the job at issue. In other words, petitioner had to be able to perform the essential functions of her position as a clinical nurse, with or without accommodation, before she could return to work. Therefore, she could have returned to work once she presented a full release indicating that she could perform the essential physical duties of her job, as described on the ADA survey; petitioner never presented such a release.

The ADA physical requirements for the job of a clinical nurse were part of the job description for clinical nurse, and petitioner was aware of the job description. The ADA physical requirements included the activity of lifting or carrying weight up to 40 lbs. 61-100% of the time, and over 40 lbs. 31-60% of the time. For example, nurses at St. Mary's were often required to lift and/or move patients or to lift and/or move weighty equipment or furniture, such as patient monitoring machines, scales or reclining chairs or beds to assist with patient comfort. Petitioner's supervisor, Joyce Pickney, wrote a letter to petitioner on September 1, 1994, which set forth the physical requirements of the job. Petitioner complains because the letter stated that St. Mary's does not have light duty positions and, therefore, petitioner had to have a full release to return to work. Petitioner did not return to work following her alleged injury, because the two releases did not allow her to engage in the essential function of lifting. She never submitted any releases to St. Mary's other than the two (2) which she obtained from Dr. Kearney stating her inability to lift.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner claims that her question is an important one for this Court tc decide, because there is no clear precedent in the lower courts; however, the lower courts correctly interpreted the statute so there is nothing for this Court to clarify. In reaching its decision, the Fifth Circuit relied on the well-reasoned opinion of the district court. The district court found that petitioner was unable to perform the essential

functions of her job, and the only accommodation that could be made was for St. Mary's to eliminate or reallocate lifting, an essential function of her job. The Americans with Disabilities Act ("ADA") does not require such elimination or reallocation of essential functions. Also, reasoning does not support a finding that St. Mary's had a 100% recovery policy. The district court concluded, and the appellate court affirmed, that petitioner had failed to state a *prima facie* case pursuant to the ADA. Neither the decisions below nor the record supports an affirmative finding by this Court to the question presented in the petition. The decisions below correctly applied the law, and petitioner does not allege a conflict among the circuits.

The sole question presented by *Petitioner Guneratne* in her petition for writ of certiorari (page i) is: Is a policy which requires all persons to have documentation of 100% recovery, no limitations, before returning to work a violation of the Americans with Disabilities Act?[1] The Fifth Circuit, however, did not decide that question. Moreover, this Court cannot decide the question presented by the petitioner based on the record. The only question that this Court can address is whether the St. Mary's return-to-work policy, requiring the employee to

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[1] Petitioner's claims under the Rehabilitation Act are subject to the same standards as her ADA claims. *See* Rehabilitation Act Amendments of 1992, Public Law No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (codified at 29 U.S.C. § 749(d)) ("the standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990").

be able to perform the essential functions of the job, is a *per se* violation of the Americans with Disabilities Act ("ADA"). The Fifth Circuit adopted the district court's analysis, *Guneratne v. St. Mary's Hosp.*, 943 F. Supp. 771 (S.D. Tex. 1996), which addressed the following issue: whether petitioner was a qualified individual – one who is able to perform the essential functions of a clinical nurse – and, if not, whether the hospital could make a reasonable accommodation for her. *Id.* at 774. The district court found that physically demanding duties, specifically lifting, are essential functions of a clinical nurse. *Id.*

In her petition for writ of certiorari, petitioner does not complain that the district court erred in finding that she was not a qualified individual. Given this Court's analysis of otherwise qualified individual summarized in *School Board of Nassau County, Florida v. Arline* 480 U.S. 273, 287 n.17 (1987), petitioner must agree with the district court that she was not a qualified individual. Moreover, petitioner has not seriously contested that lifting is an essential function of a clinical nurse. Instead she faults the district court's analysis and conclusion that there is no accommodation that would permit her to perform the essential functions.

A. Reasonable Accommodation and the ADA

The ADA provides that reasonable accommodation is required when the limitation is known or obvious to the employer; the individual is otherwise qualified and has a disability; and the accommodation will not impose an undue hardship on the employer. 42 U.S.C.

§ 12115(b)(5)(a). Reasonable accommodation is very broad, and includes such things as job restructuring to remove non-essential job functions, modified work schedules, and medication. *See* 42 U.S.C. § 12111(9); *Chiari v. City of League City*, 920 F.2d 311, 317-18 (5th Cir. 1991).

St. Mary's return-to-work policy required petitioner to present "a physician's release to full duties with no restrictions" before she could return to work. To determine whether the release was sufficient to enable her to return to work, any restrictions noted on the release had to be measured against the ADA physical requirements for her job. Therefore, before she could return to work, petitioner had to be able to perform the essential functions of her job, with or without accommodation, according to the ADA criteria. St. Mary's was not seeking a statement that petitioner had recovered 100%; rather, it was simply seeking a full medical release from petitioner's doctor that would allow her to perform the essential functions of her job.

Petitioner has continually misconstrued this requirement as a *per se* violation of the ADA. Courts have defined a *per se* violation as one in which an individual assessment of an individual's ability to perform the essential functions of the person's job with or without accommodation is not made by the employer. *See, e.g., Hammer v. Board of Educ. of Arlington Heights*, 955 F. Supp. 921, 927 (N.D. Ill. 1997). The ADA, however, does not require an employer to eliminate or reallocate essential functions of a position in order to provide accommodation. *Zevator v. Methodist Hosp. of Houston, Texas*, 1995 WL 500637 (S.D. Tex. Mar. 30, 1995); *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th

Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Emrick v. Libbey-Owens-Ford Co.*, 875 F.Supp 393, 398 (E.D. Tex 1995). "Such redefinition exceeds reasonable accommodation." *Bradley* 3 F.3d at 925.

In *Zevator v. Methodist Hospital of Houston, Texas*, 1995 WL 500637 (S.D. Tex. Mar. 30, 1995), the plaintiff, a staff nurse in the psychiatry department of Methodist Hospital, was involved in a series of automobile accidents. *Id.* As a result of injuries which she sustained in these accidents, the plaintiff returned to work with restrictions on standing and lifting. *Id.* The plaintiff requested relief from some of the physical aspects of patient care, including turning patients, helping them walk, and various acts of lifting. *Id.* The plaintiff felt that these were merely "marginal aspects" of her job which could be reassigned to other staff nurses. *Id.* The district judge, however, disagreed and found that these physical requirements were essential functions of a nurse's job which were not required to be reassigned pursuant to the ADA. *Id.* Similar to the requirements in *Zevator*, petitioner's inability to lift "more than 5 lbs." or any "heavy objects," rendered her unable to perform essential functions of her job as a clinical nurse. Therefore, St. Mary's return-to-work policy, which is based on safety and health considerations and not complete recovery, is not a *per se* violation of the ADA. Petitioner was simply not a qualified individual: she could not perform the essential functions of the job of clinical nurse at St. Mary's Hospital.

B. Reasonable Accommodation and the Petitioner's Burden

Petitioner cites a portion of a case from the Court of Appeals for the Seventh Circuit that states: "It is plain enough what 'accommodation' means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (citation omitted). This opinion also states that the ADA and the implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. *Id.* at 1137. In that case, the employee, unlike petitioner, made specific requests for accommodation. *See id.* at 1136. Furthermore, the burden is on the employee to demonstrate that she is otherwise qualified through a two-step inquiry: first, she must be able to perform the essential functions of the job; and second, if she is unable to perform the essential functions, she must establish whether a reasonable accommodation by the employer would enable her to perform those functions. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). Even if the parties engage in an interactive process, the ultimate burden remains on the employee to produce evidence that reasonable accommodations were available. *See Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (11th Cir. 1997).

In this case, petitioner never requested to be accommodated; St. Mary's had a form for making such a request, and petitioner had previously used the form.

Moreover, the Fifth Circuit has held that it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process of determining an accommodation, and, therefore, if the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one. *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir.), *cert. denied*, 117 S.Ct. 586 (1996). Furthermore, petitioner has never demonstrated, and cannot, that St. Mary's could reasonably accommodate her disability. *See Rogers v. International Marine Terminals*, 87 F.3d 755, 759 (5th Cir. 1996) (employee must demonstrate that employer can reasonably accommodate the disability). *See also Leatherwood v. Houston Post Co.*, 59 F.3d 533, 536 n.4 (5th Cir. 1995) (employee did not request accommodation and did not offer evidence of what specific accommodation would have worked other than someone performing his duties).

Not until her deposition did petitioner suggest an accommodation. Then, she suggested that she should have been allowed to avoid heavy lifting and/or permitted to "request assistance" in situations where heavy lifting was required. Such an accommodation would eliminate or reallocate an essential function of Plaintiff's job, which the ADA does not require. Additionally, such an accommodation could have posed a risk to the welfare of St. Mary's patients if an emergency situation had arisen which required immediate action. *See Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (" . . . an individual is not qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure

others, and the employer cannot modify the job to eliminate that risk" (citation omitted)), *cert. denied*, 116 S. Ct. 1263 (1996); *see also* 29 C.F.R. § 1630.2(r). If no reasonable accommodation by the employer would enable the plaintiff to perform the essential functions of the position, then she is not a "qualified individual" with a disability and is not subject to the protection afforded by the ADA. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 213-14 (4th Cir. 1994). The record in this case proves that petitioner did not meet her burden, and the record also supports the lower courts' finding that petitioner was not a qualified individual.

C. The Policy: Medical Release or 100% Recovery?

Petitioner has continually misstated the requirements of St. Mary's return-to-work policy. The policy requires that a worker be medically released to return to her job – not that she be 100% recovered. St. Mary's request does not fit the definition of a *per se* violation. *See Hammer*, 955 F. Supp. at 927 (*per se* violation occurs where no individual assessment of ability to perform job occurs).

For St. Mary's return-to-work policy to be a *per se* violation, this Court would have to find that the record demonstrated that St. Mary's required petitioner to perform non-essential job duties. To so find, this Court would have to determine that lifting was a marginal job function. *See Chandler*, 2 F.3d at 1393 (essential function is one that bears more than a marginal relationship to job at issue). The lifting function occupied 61-100% of the time; therefore, it is most definitely not a marginal job function.

St. Mary's policy followed the requirements of the ADA by comparing petitioner's restriction to the essential job functions of a clinical nurse. This comparison only ensured that the medical release allowed petitioner to perform the essential functions of her job. Petitioner is attempting to complain that the policy prohibited the interactive process to determine a reasonable accommodation. The only accommodation supported by the record would involve eliminating functions that occupied 61-100% of petitioner's time. The ADA does not require such restructuring; therefore, there is no *per se* violation of the ADA.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: October 24, 1997

Respectfully submitted,

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